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Submissions by Corruption Watch: Protected Disclosures Amendment Bill

Introduction

1. Corruption Watch is a non-profit civil society organisation. It is independent, and it has no political or business alignment. Corruption Watch intends to ensure that custodians of public resources act responsibly to advance the interests of the public. Its ultimate objectives include fighting the rising tide of corruption, the abuse of public funds in South Africa, and promoting transparency and accountability to protect the beneficiaries of public goods and services.

2. Corruption Watch has a vision of a corruption free South Africa, one in which educated and informed citizens are able to recognise and report corruption without fear, in which incidents of corruption and maladministration are addressed without favour or prejudice and importantly where public and private individuals are held accountable for the abuse of public power and resources.

3. Corruption Watch welcomes the opportunity to make submissions on the Protected Disclosures Amendment Bill, [B40 – 2015][1] ("the Amendment Bill") read in accordance with the Memorandum on the Objects of the Protected Disclosures Amendment Bill, 2015 ("Memorandum on Objects").

4. While we welcome the initiative taken by the Department of Justice and Correctional Services (the "Department") to extend the application of the Protected Disclosures Act, 26 of 2000 ("the Act") and to strengthen whistle-blower protection in respect of employees and

[1] Explanatory memorandum to the Bill published in *Government Gazette* No. 39479 of 4 December 2015.

workers, we have concerns about the implementation of the Amendment Bill and certain practical challenges which face employees and workers when making protected disclosures.

5. In these submissions, we engage in a brief analysis of:

   5.1. The definition of "business" and "worker";

   5.2. The expanded definition of "occupational detriment"

   5.3. Section 9A which excludes civil and criminal liability for protected disclosures;

   5.4. The introduction of offences for making disclosures in bad faith;

6. The above analysis is followed by a more general discussion of the limitations which persist in the Amendment Act as well as suggestions on how to address some of the limitations.

Definition of "Business" and "Worker"

7. The Amendment Bill introduces a new definition of business and extends the definition of worker to include workers employed by a temporary employment service and those employed as independent contractors, consultants or agents. According to paragraph 1 of the Memorandum on the Objects of the Bill, the Bill aims to extend the application of the Act beyond the traditional employer and employee relationships. We welcome the extension of the definition in this manner and anticipate a much wider use of the Act as a result of this extended definition.

8. However, we are concerned about those individuals who occupy positions of authority and governance which may not be regarded as employment relationships for purposes of the Act or Amendment Act, but which may place them in situations which expose them to information about corruption, results in them making disclosures about such corruption but who do not receive any protection from detriments which are imposed by the institutions which they are responsible for governing or overseeing.

9. We refer in particular to members of school governing bodies ("SGB's"), members of boards who are responsible for trusts, companies, voluntary associations and a wide range of other private and public bodies. Our experience has shown that although such members are empowered to govern and make decisions in relation to the institutions concerned, as well as to be responsible for good governance, they are not protected from reprisals when they make disclosures about corruption at the relevant institutions. For example, we have had several SGB members, removed from their SGB on account of them having made a disclosure about the mismanagement of school funds by other members of the SGB, often in collusion with the school principal. We refer here to the whistle-blower stories contained in our schools report, "Loss of Principle" published in October 2015.[2]

10. Although we appreciate that the objective of the PDA is to protect those in employment relationships, the current extension of the definition of "business" and "employee" may offer an opportunity to consider the further extension of the application of the Act to those who occupy positions of authority outside of employment relationships but who nevertheless play an important role in ensuring good governance. In our view, these individuals are most often elected representatives belonging to voluntary governance structures in private and public bodies or institutions. An extension of the Act to include such individuals will allow for the protection of those who are directly responsible for governance and oversight and whose positions allow for significant opportunities for the monitoring, detection and reporting of corruption and other malfeasance.

11. Also, in reference to the expanded definition of worker, our interpretation of the definition is one that includes juristic persons and therefore in relation to the expanded definition of occupational detriments in the new paragraph J, also refers to suppliers and service providers who are adversely affected. We submit that such an interpretation will create significant scope and opportunity for protected disclosures to be made in reference to procurement irregularities.

[2] http://www.corruptionwatch.org.za/wp-content/uploads/2015/10/A-report-on-corruption-in-schools_single-web.pdf

Definition of occupational detriment and exclusion of civil and criminal liability

12. One of the Amendment Act's most significant amendments concerns the definition of occupational detriment which is now defined to include "*being subjected to any civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of the disclosure of a criminal offence*." An employee or worker may therefore allege that he is being subjected to an occupational detriment if his or her employer lodges a civil claim for the breach of a duty of confidentiality or confidentiality agreement.

    12.1. Firstly, the restriction of the definition of an occupational detriment to disclosures of criminal offences is too narrow. Employees and workers should be protected even when making disclosures about procurement irregularities, breach of legal obligations and other information referred to in the amended definition of "protected disclosure".

    12.2. Secondly, the definition of occupational detriment should also include a prohibition on the lodging of criminal proceedings against an employees or workers by his or her employer. Restricting protection to only civil liability for breach of contracts or duties of confidentiality significantly reduces the protection offered to employees and workers who make protected disclosures and who could still be subject to criminal action.

    12.3. Thirdly, the employee or worker may be subjected to an occupational detriment for breaching a legislative prohibition on disclosing information, and most legislative prohibitions create offences for such disclosure therefore excluding the employee or worker from the application of the section in terms of section 1(e)(i) of the Act.

    For example, section 22 of the Financial Services Board Act, 97 of 1990 ("FSB Act") sets out the limited circumstances under which information obtained in the performance of any power or function under the Act, or sections 45 and 45B of the Financial Intelligence Centre Act, 38 of 2001, may be utilised or disclosed by board members, employees and other recipients of information. Section 27 of the FSB Act states that any person who contravenes section 22 shall be guilty of an offence and on

conviction, liable to a fine not exceeding R1 million or to imprisonment for a period not exceeding five years or to both such fine and imprisonment. It appears that an employee of the FSB who discloses information in violation of section 22 of the FSB Act, commits an offence by doing so and so cannot be protected from occupational detriments by the employers in terms of the Act. This anomaly reduces the protection available to employees, especially those in high ranking and senior positions in government who wish to make protected disclosures but are hamstrung by statutory confidentiality obligations.

12.4. Finally, in deciding the reasonableness of a general protected disclosure in terms of section 9(3), consideration may still be had for whether the disclosure was made in breach of a duty of confidentiality of the employer towards any other person. This is at odds with the new definition of occupational detriment which aims to protect employees and workers who breach confidentiality agreements when making a protected disclosure.

13. The new definition of occupational detriment should be considered together with the new section 9A which states that:

> "*A court may find that an employer or worker who makes a protected disclosure of information in accordance with paragraph (a) of the definition of disclosure which shows or tends to show that a criminal offence has been committed, is being committed or is reasonably likely to be committed shall not be liable to any civil, criminal or disciplinary proceedings by reason of having made the disclosure if such disclosure is prohibited by any other law, contract, practise or agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of the information with respect to a matter*."

14. This section appears to extend protection from civil and criminal liability for the making of protected disclosures but does so in a manner which obliges the employee or employer to show why he or she should not be subjected to civil or criminal liability. The limitation to disclosures of criminal offences is again a significant reduction in protection of whistle-blowers.

15. The employee or worker is only protected from civil or criminal liability where he or she makes a disclosure which show or tends to show that a criminal offence has been committed. This significantly narrows the scope of what may be disclosed and prevents an employee or worker from making disclosures of information the other five issues which are ordinarily regarded as disclosures for purposes of the Act. For example, an employee or worker will not be protected from civil or criminal liability if he or she makes a disclosure about any failures to comply with a legal obligation, including procurement irregularities, the most common form of disclosure which we have come across in our work. We submit that the limited protection from civil and criminal liability only when the disclosure concerns a criminal offence is too narrow and that protection should extend to all disclosures in terms of section 1(b) of the Amendment Act.

Duty to inform employee or worker

16. The new section 3B provides for time periods within which an employer must revert to the employee or worker on steps taken to address or investigate his or her protected disclosure.

17. Firstly, we submit that **detailed reasons** must be provided by the employer for any failure to take steps or any decision not investigate a reported matter. The provision of reasons is essential to ensuring that the employer is held accountable for any arbitrary decisions and to ensure that employees and workers are able to interrogate whether the employer has applied his or her mind to the matter.

18. Secondly, the duty to inform should not only relate to disclosures in terms of section 6, 7, or 8 but also section 9 which provides for general protected disclosures and in this regard, the duty to inform should be a general one, aimed at the workforce or entity responsible for informing the employer about the disclosure. An important and significant accountability mechanism has been introduced by amendment however, this mechanism may be limited by not extending the obligation of employers to report on steps taken or decisions taken in relation to general protected disclosures.

New offence for the disclosure of false information

19. The offence for the disclosure of false information is likely to deter employees and workers from making protected disclosures since some information may appear to be legitimate but may, after investigation, prove to be false or unreliable. This is the purpose of having the employer investigate the protected disclosure and revert to the employee on the veracity and possible action if proven to be true. In this regard, disclosures are not regarded as being protected, if an employee does not make it in good faith. Employees who make bad faith protected disclosures may therefore not be able to claim that his or her dismissal was automatically unfair, a sanction which already exists in terms of the Act. The introduction of an offence is therefore unnecessary and may serve to deter employees and workers from making disclosures.

General Commentary

20. Corruption Watch has the privilege to work with whistle-blowers, some in formal employment relationships and others serving as members of a variety of voluntary associations. Irrespective of whether these individuals benefit from the protection of the Act, their vulnerabilities and commitment to advancing good governance and accountability in their institutions, are commendable and courageous.

21. Whistle-blowers risk their livelihood, the safety and security of themselves and their families, their reputation and status and belonging within communities, all in order to ensure that corrupt individuals and institutions are held to account.

22. Many find themselves on suspension, without employment or with no significant prospect of continued employment, given their exposure of corrupt activity and are then required to pursue their rights in terms of the Act. In this regard, legal expenses for a court application can amount to tens of thousands of rands. Legal aid is not often available to these individuals and so they are required to pursue an application to vindicate rights guaranteed in the Act and which flow from constitutional entrenched rights. Civil society organisations

are not always placed to assist whistle-blowers in this manner and so on their own, with limited funds and access to legal services, equality of arms is not guaranteed or achieved. These challenges are a major bar to those wishing to report corruption, a report which is in most instances, in the public interest and not in his or her direct interest. All employees dismissed or subjected to occupational detriments find themselves in precarious positions however, whistle-blowers have additional challenges and make disclosures in the public interest.

23. The immense struggle of Mr Motingoe, a legal adviser in the Department of Infrastructure and Public Works in the Northern Cape is a reflection of the journey of so many whistle-blowers who face similar challenges. A Labour Court judgment which addressed the vulnerability of whistle-blowers[3] and a media article which further highlights the difficulties faced by Mr Motingoe[4] make clear the unacceptability of such situations. We suggest that bespoke and tailored mechanisms for dispute resolution in the CCMA and Labour Court, be crafted in order for whistle-blowers to better access the protection of the Act.

24. Further to this, and in light of the introduction of a criminal offence for the disclosure of false information by employees and workers, which we do not accept, we wish to draw attention to the conduct of employers. In the Labour Court judgment on Mr Motingoe's matter, the Court highlighted its displeasure with the conduct of the employers in handling Mr Motingoes matter.[5] We suggest that the Act be amended to include sanctions for breaches of the Act by employers. In this regard, the introduction of personal liability for such breaches should be considered. Personal liability for unacceptable conduct has been considered in the recent case of *Solidarity and Others v South African Broadcasting Corporation* ZALCJHB 273 (26 July 2016)[6] and expressed more clearly in *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government* ZASCA 67 (27 May 2013) where in paragraph 54 the court held:

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[3] http://saflii.mobi/za/cases/ZALCCT/2014/71.pdf
[4] http://www.financialmail.co.za/opinion/ingoodfaith/2015/07/31/in-good-faith-hail-the-whistle-blowers
[5] *Motingoe v Head of the Department: Northern Cape Department of Infrastructure And Public Works and Another* ZALCCT 71 (12 December 2014) http://saflii.mobi/za/cases/ZALCCT/2014/71.html
[6] http://www.saflii.org/za/cases/ZALCJHB/2016/273.html

"*In the present case the best that can be said for the MEC and her department is that their conduct, although veering toward thwarting the relief sought by the Board, cannot conclusively be said to constitute contempt of court. However, that does not excuse their behaviour. The MEC, in her responses to the opposition by the Board, appeared indignant and played the victim. She adopted this attitude whilst acting in flagrant disregard of constitutional norms. She attempted to turn turpitude into rectitude. The special costs order, namely, on the attorney and client scale, sought by the Board and Mafojane is justified. However, it is the taxpayer who ultimately will meet those costs. It is time for courts to seriously consider holding officials who behave in the highhanded manner described above, personally liable for costs incurred. This might have a sobering effect on truant public office bearers. Regrettably, in the present case, it was not prayed for and thus not addressed*."[7]

25. Other supportive mechanisms include the establishment of a special fund to support the legal costs of whistle-blowers or to incentivise the reporting of corruption. An OECD study on best practices from around the world in relation to the protection of whistle-blowers found that,

"*to encourage whistleblowing, some G20 countries have adopted rewards systems, including monetary rewards. In the U.S., for example, the False Claims Act, allows individuals to sue on behalf of the government in order to recover lost or misspent money, and can receive up to 30 percent of the amount recovered.62 The Dodd-Frank Act also authorizes the SEC to pay rewards to individuals who provide the Commission with original information that leads to successful SEC enforcement actions (and certain related actions). Rewards may range from 10 percent to 30 percent of the funds recovered. Korean law also provides monetary rewards for whistleblowers who disclose acts of corruption. The ACRC may provide whistleblowers with rewards of up to USD 2 million if their report has contributed directly to recovering or increasing revenues or reducing expenditures for public agencies. The ACRC may also grant or recommend awards if the whistleblowing*

[7] http://www.saflii.org/za/cases/ZASCA/2013/67.html

has served the public interest.63 Indonesian law also makes provision for the granting of "tokens of appreciation" to whistleblowers who have assisted efforts to prevent and combat corruption."

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